In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 744

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–26) is reported at 350 F. 2d 365. The Board's Decision and Order (R. 78–79, 42–75)[1] is reported at 144 NLRB 433.

JURISDICTION

The judgment of the court of appeals was issued on July 12, 1965 (Pet. 27–28). A petition for rehearing was denied on September 7, 1965 (Pet. 29). The petition for a writ of certiorari was filed on Novem-

[1] "R." and "B.A." references are to the Transcript of Record and the Board's appendix filed in the court below.

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ber 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act by insisting as a condition to an agreement that the collective bargaining contract contain a performance bond provision.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
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> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agree-

ment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party * * *.

STATEMENT

The petitioner corporation is engaged in the business of warehousing and compressing cotton. In April 1962, following an election, the Board certified the Union [2] as the exclusive bargaining representative for a unit of Company employees (R. 44–45). Between June and October of the same year, bargaining meetings were held in which Company officials Boone and Dupuy and Union officials Vicknair and Shanklin were the chief negotiators (R. 45; B.A. 4, 10–11, 33).

At the first of these meetings on June 4, the Union presented the Company with a summary of the contract terms it wanted (R. 45; B.A. 12). At a subsequent meeting on June 13, the Company presented its contract proposals (R. 45; B.A. 15). The Company's proposals included, *inter alia*, a performance bond clause, a no-strike no-lockout clause, and a non-observance of picket line clause.[3] Although the Union ob-

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[2] United Packinghouse, Food and Allied Workers, AFL-CIO.

[3] The three provisions were as follows (R. 47):

"Both the Company and the Union agree to obtain and deliver to each other a performance bond written by a corporate surety company, payable to the other party in a penalty amount of _____ dollars in order to insure and guarantee the faithful performance of this contract by both parties.

* * * * *

"The Union agrees that the employees of the Company will cross any picket line put up around or near any of the Company's plants by any other union and will work in a normal

jected to the inclusion of these provisions in a contract, petitioner indicated at this meeting "that they wanted to have, they had to have" them before agreement could be reached (B.A. 15–17, 24–28).

At the next meeting on June 27 and 28, the Union and Company continued to discuss the contract proposed by the Company, reaching tentative agreement on some provisions (R. 46; B.A. 18–21). With respect to the performance bond and the other two clauses, however, the Company continued to insist that they be included in a contract and the Union contin-

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way; the Union further agrees that the employees of the Company will not refuse to handle or work on any goods which may be claimed as unfair or hot by any union, including the union which is a party to this contract. The Union agrees to be responsible for the actions of the Company's employees, regardless of whether such actions are authorized by the Union. The failure of the Company's employees to abide by the provisions of this article shall constitute a violation by the Union of this contract.

* * * * *

"There shall be no strike, slow-down, work stoppage, interruption of work or any other activity on the part of the employees which causes a reduction in the normal amount of work or business of the Company. The Union shall be responsible for any such activities on the part of the employees, regardless of whether the Union has authorized the employees to engage in any such activities; it being intended that any such activities on the part of employees shall constitute a violation by the Union of this contract.

"There shall be no lock-out by the Company or any other activity on the part of the Company which produces the effect of a lock-out. The Company shall be responsible for any such activity on the part of any of its management or supervisory personnel, regardless of whether the Company has authorized such personnel to engage in such activities. Any such activities on the part of management personnel or supervisory personnel shall constitute a violation by the Company of this contract."

ued to oppose their inclusion (R. 48-50; B.A. 19-21, 28-32, 45-46, 48-50). The Company took the position that a performance bond was necessary to provide some type of protection against irresponsible union action (R. 48; B.A. 21), and that "the performance bond had to be part of the contract otherwise there would be no contract as far as they would be concerned" (B.A. 21). The Company "insisted that they would not bargain or trade" on the performance bond provision and the other two clauses (R. 50; B.A. 45).

On July 12, when the parties next met, they reiterated their positions with respect to the three clauses (R. 50; B.A. 34-36, 41). With respect to the performance bond, "the company's position was that it was one thing they must have in this contract" (B.A. 36). A subsequent meeting held on July 31, in which the Federal Mediation and Conciliation Service participated, failed to change the parties' respective views (R. 50; B.A. 23-24, 32).

A final meeting was held on October 10. At that time the Union suggested that it would drop its request for a union-shop provision if the Company eliminated its demand for the performance bond (R. 51; B.A. 37, 40). The Company, however, continued to insist on inclusion of the performance bond provision and the other two disputed clauses (R. 51; B.A. 37-38, 41).

The Board, affirming its Trial Examiner, found that the Company conditioned execution of a contract with the Union upon inclusion in the contract of the three disputed clauses, including the performance bond clause. The Board further found that, since the per-

formance bond clause was a non-mandatory bargaining subject, the Company's insistence on such clause violated Section 8(a) (5) and (1) of the Act. (R. 52–53, 78.) The Board ordered the Company to cease its unlawful conduct and to bargain, on request, with the Union (R. 70–71). The court of appeals sustained the Board's findings and enforced its order regarding the violation of Section 8(a) (5) and (1) (Pet. 16–24).[4]

ARGUMENT

The decision of the court below is correct and it is not in conflict with any other decision. There is no occasion for further review.

1. In *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, the Court held that a party to collective bargaining negotiations cannot condition willingness to negotiate or contract about matters which are the subject of compulsory bargaining upon the other party's acceding to demands which are outside that area. Petitioner's basic argument is that, although it proposed a performance bond provision, it did not insist on that provision as a condition of reaching an agreement. However, the Trial Examiner and the Board found to the contrary, and the court of appeals concluded that "There was * * * ample evidence to support the finding of the Trial Examiner and of the Board that as a condition to reaching any agreement the Com-

[4] The Board also found that the Company violated Section 8(a)(3) by refusing to reemploy one Baylock. The court of appeals did not sustain this finding (Pet. 24–25). The issue respecting Baylock is not before the Court.

pany insisted upon the inclusion of the three disputed provisions" (Pet. 20). Accordingly, petitioner's contention raises only an evidentiary issue which does not warrant review by this Court.

Petitioner stresses the absence of a finding of causal relationship between the insistence on a non-mandatory subject and the failure to reach agreement (Pet. 8-9). But if inclusion of a non-mandatory subject was "a condition to reaching any agreement," it was clearly a cause of the failure to reach agreement. Nor is there substance to petitioner's contention that, since the parties had not as yet reached agreement on all the mandatory bargaining subjects, the non-mandatory subject could not have caused the impasse (Pet. 7-8). As the court below properly observed (Pet. 21-22), the insistence on the non-mandatory subject "need not be the sole cause for the failure to agree." That is, where, as here, the facts show that no final agreement was possible unless the Union capitulated to the Company's demand for the performance bond, it is irrelevant that there were also other subjects blocking agreement. For even if the latter were ultimately eliminated, the non-mandatory subject would still stand as an obstacle to a final resolution. See *Industrial Union of Marine and Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615, 618 (C.A. 3), certiorari denied *sub nom. Bethlehem Steel Co.* v. *National Labor Relations Board*, 375 U.S. 984.

2. Petitioner also challenges the holding of the court below that a performance bond is a non-mandatory subject of bargaining. Although the question has

not yet been decided by this Court, the court below correctly noted that "the Courts of Appeals and the Board have uniformly and repeatedly indicated and held that a performance bond clause of the type here involved is not within the compass of mandatory collective bargaining" (Pet. 23)[4] and this Court has repeatedly denied certiorari.[5] Furthermore, there is a reasonable basis for that conclusion. Mandatory subjects of bargaining are those involving "wages, hours, and other terms and conditions of employment" (National Labor Relations Act, Section 8(d), and a

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[4] The court cited (Pet. 23, n. 7): "*Local 164, Brotherhood of Painters* v. *National Labor Relations Board*, D.C., Cir. 1961, 293 F. 2d 133; *International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB 972, 978–979, aff'd on other grounds, *sub nom.; Rabouin* v. *National Labor Relations Board*, 2 Cir. 1962, 195 F. 2d 906; *National Labor Relations Board* v. *Davison*, 4 Cir. 1963, 318 F. 2d 550; *National Labor Relations Board* v. *Dalton Tel. Co.*, 5 Cir. 1951, 187 F. 2d 811; *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 4 Cir. 1950, 180 F. 2d 701; *National Labor Relations Board* v. *Tuarmina*, 5 Cir. 1953, 207 F. 2d 251; *National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.*, 10 Cir. 1959, 273 F. 2d 710; *National Labor Relations Board* v. *IBS Mfg. Co.*, 5 Cir. 1964, 340 F. 2d 634, 639 (dissenting opinion); *Jasper Blackburn Products Corp.*, 21 NLRB 1240; *Scripto Mfg. Co.*, 36 NLRB 411; *Interstate Steamship Co.*, 36 NLRB 1307; *Dalton Telephone Co.*, 82 NLRB 1001; *Standard Generator Service Co.*, 90 NLRB 790; *Arlington Asphalt Co.*, 136 NLRB 742."

[5] *Local 164, Brotherhood of Painters* v. *National Labor Relations Board*, 293 F. 2d 133 (C.A. D.C.), certiorari denied, 368 U.S. 824; *National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.*, 47 LLRM 2480, certiorari denied, 366 U.S. 914; *National Labor Relations Board*, v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), certiorari denied, 340 U.S. 811.

demand for a performance bond does not seem to come within those categories. It deals exclusively with sanctions for violations. Unlike grievance and arbitration clauses and other procedural rules for resolving disputes over the meaning of an agreement or filling in its interstices, performance bonds do not relate directly or indirectly to any conditions of employment and have not been traditional subjects of collective bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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